IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 69

WCC No. 9312-6967

AMERICAN STORES d/b/a BUTTREY FOODS

Appellant

vs.

MARGIE REAP

Respondent.

DECISION AND ORDER ON APPEAL

This appeal is from the October 27, 1993 findings of fact, conclusions of law and order entered by James L. Keil, a hearing examiner for the Montana Department of Labor and Industry (DLI). The order affirmed a prior order of the Employment Relations Division waiving the 12-month deadline for the filing of respondent's workers' compensation claim. On November 29, 1993, appellant, American Stores, which does business as Buttrey Foods (Buttrey), appealed the order to this Court. Thereafter, on December 9, 1993, it filed an Amended Petition on Appeal.[(1)] The record on appeal consists of the DLI file, which includes a transcript of the hearing held below and copies of the depositions and exhibits considered by the hearing examiner.

In its appeal, Buttrey contends that the hearing examiner's decision was clearly erroneous. For the reasons set forth in this decision, the DLI order is **affirmed**.

Background

The respondent in this matter, Margie Reap (Reap), worked as a grocery checker for Buttrey from 1985 to May 14, 1990. She began experiencing numbness and tingling in her hands and arms while pregnant in 1989. The cause of the tingling was diagnosed in February 1990 as carpal tunnel syndrome. According to her testimony, while working on February 3, 1990, Reap experienced pain in her right shoulder and arm while picking up a bag of groceries to set into a shopping cart. According to Reap, she promptly informed her immediate supervisor, Julie Edwards (Julie Koehne at the time), that she had pulled something in her right arm when lifting groceries. In her deposition Edwards confirmed that Reap had reported the incident to her on February 3, 1990. On February 15, 1990, Reap sought medical treatment from Dr. Stephen Powell, who is an orthopedic surgeon specializing in

hand and wrist problems. At that time Reap was primarily complaining of numbness in her right hand and aching in her right wrist. However, she also reported aching in her elbow, upper arm and shoulder. (Powell Dep. at 7-8; Powell Dep. Exs. 1 at 3-4 and 2.) Dr. Powell diagnosed carpal tunnel syndrome and attributed all of Reap's symptoms to that condition. On May 15, 1990, he performed carpal tunnel release surgery. Based on her carpel tunnel syndrome, Reap filed a claim with Buttrey. The claim was accepted as compensable under the Occupational Disease Act. The OD claim has been settled and is not an issue in this proceeding. Following surgery Reap's hand and wrist symptoms subsided. However, she experienced worsening pain in her neck and in her right shoulder and arm. Dr. Powell continued to attribute those symptoms to her carpel tunnel syndrome. In June of 1990, he diagnosed tendinitis in Reap's shoulder and elbow, but characterized it as possibly stemming from disuse on account of carpal tunnel discomfort; he prescribed physical therapy. In August of 1990, Dr. Powell referred Reap to Dr. Gary Cooney, a Missoula neurologist, for nerve conduction studies. Dr. Cooney informed Reap that some of her symptoms might be due to something other than carpal tunnel syndrome, however, he deferred to Dr. Powell for further diagnosis. On December 10, 1990, Dr. Powell examined Reap and concluded that she had satisfactorily healed from the carpal tunnel syndrome. He characterized her arm and shoulder complaints as "diffuse myofacial complaints about the right upper extremity which I cannot define with a diagnosis." (Powell Dep. Ex. 1 at 6.) Dr. Powell reexamined Reap on June 19, 1991. At that time he characterized her continuing shoulder and elbow pain in the following terms: "[I]t appears historically that this may be an overuse syndrome which has caused myfascitis [sic] of the shoulder and of the elbow." Reap then sought care from Dr. Daniel Gannon. On August 14, 1991, over eighteen months after the February 3, 1990 incident at work, Dr. Gannon identified a herniated cervical disc as the source of Reap's arm, shoulder and neck pain. On August 15, 1991, Reap submitted a claim for compensation indicating a date of injury of May 12, 1990. Later on she identified the injury date as February 3, 1990. On June 18, 1992, Dr. Pius Baggenstos confirmed the existence of a herniated C5-6 disc through an MRI scan. Based on the history provided by Reap, Dr. Baggenstos attributed the herniated disc to Reap's February 3, 1990 incident. Buttrey denied the claim filed by Reap on August 15, 1991, and persists in that denial. Pursuant to subsection (2) of section 39-71-601, MCA, Reap applied to the DLI for a waiver of the one year statute of limitations prescribed by subsection (1) of the statute. On June 22, 1992, the Employment Relations Division of the DLI granted Reap's request, thereby waiving the one-year statute of limitations. Buttrey requested a contested case hearing. After hearing the DLI hearing examiner affirmed the waiver, and the present petition for judicial review ensued.

Discussion

This case comes to the Court pursuant to section 39-71-204 (3), MCA, which generally provides for an appeal to the Workers' Compensation Judge from any order of the

Department of Labor and Industry made under title 39, part 71.[2] In its amended petition on appeal, Buttrey advances the following ground in support of its request for reversal: The Hearing Unit's decision was clearly erroneous in light of the facts on the record before the Department of Labor and Industry. On record before the Department of Labor and Industry were facts which clearly showed that Respondent had knowledge of her condition which should have led her to file her claim in a timely manner. . . . The standard of this Court's review is well established. An agency decision must be reversed where its findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." ***State Compensation Mutual Insurance Fund v. Lee Rost Logging,*** *252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA).* On appeal the Court will not re-weigh the evidence. ***Nelson v. EBI Orion Group,*** *252 Mont. 286, 288, 829 P.2d 1 (1992).* Conclusions of law are reviewable to determine if they are correct. ***Steer, Inc. Department of Revenue,*** *245 Mont. 470, 474, 803 P.2d 601 (1990).* The time for filing the workers' compensation claim at issue in this case is governed by section 39-71-601, MCA (1989), which provides:

39-71-601. Statute of limitation on presentment of claim -- waiver. (1) In case of personal injury or death, all claims must be forever barred unless presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf. (2) The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of: (a) lack of knowledge of disability; (b) latent injury; or (c) equitable estoppel.

Claimant did not file her claim within the one year specified by subsection (1), and Buttrey initially contends that the waiver granted by the DLI pursuant to subsection (2) of section 39-71-601, MCA, was erroneous because the evidence presented at hearing did not support a determination that an industrial accident in fact occurred on February 3, 1990. A pre-hearing order governing the proceeding below was prepared by the hearing examiner and filed on August 31, 1992. According to the certificate of service, it was mailed on that date to counsel for both parties. The pre-hearing order sets forth the following statement as an uncontested fact: "The claimant sustained an injury while working in the course and scope of her employment on February 3, 1990." The quoted statement also appears as an uncontested fact in the hearing examiner's findings of fact. Buttrey now asserts that it never agreed that claimant suffered a work-related injury on February 3, 1990, and contends that the uncontested fact to that effect was erroneously included in the pre-hearing order and the hearing examiner's final decision. Buttrey's assertion in this regard is made for the first time in a reply brief filed with this Court on appeal. Accompanying that reply brief is an affidavit of Buttrey's attorney, Sara R. Sexe, which states that during the pre-hearing conference preceding the issuance of the pre-hearing order, Buttrey's counsel objected to including the fact of the accident as an uncontested fact. There is no transcript of the pre-

hearing conference. However, assuming that an objection was made during the pre-hearing conference, Buttrey's counsel could and should have brought the matter to the hearing examiner's attention after receiving the pre-hearing order so he could correct the error. The Supreme Court "has consistently held that parties must make their objections known to the trial court at the time the objectionable conduct or evidence is introduced in order to preserved the issue for purposes of appeal." ***Cosner v. Napier,*** *249 Mont. 153, 154, 813 P.2d 989 (1991).* While an administrative agency or hearing officer is not a "trial court" per se, the purpose behind the rule -- to allow the adjudicator an opportunity to avoid or correct error -- applies equally to contested case proceedings before agencies. Under the circumstances of this case, Buttrey's failure to bring the alleged error to the attention of the hearing examiner constituted a waiver of its objection and precludes consideration of its argument by this Court. Moreover, jurisdiction to determine whether or not an industrial accident in fact occurred is vested in the Workers' Compensation Court. ***See Poppleton v. Rollins, Inc.,*** *226 Mont. 267, 271, 735 P.2d 286 (1987) (holding that the Workers' Compensation Court has exclusive jurisdiction to determine whether a claimant suffered a compensable injury under the Workers' Compensation Act).* Certainly, it is within the powers of the DLI in the first instance to determine certain matters affecting a worker's entitlement to benefits under the Workers' Compensation Act. One of the matters over which the DLI is vested with jurisdiction is the waiver of the one-year statute of limitations. However, section 39-71-601 (2), MCA, does not authorize the DLI to engage in fact-finding concerning the occurrence or non-occurrence of an industrial accident. The statute specifies the grounds for waiver, and thus the matters it may properly consider. They are:

(a) lack of knowledge of disability; (b) latent injury; or (c) equitable estoppel.

39-71-601 (2), MCA. In the present case, the DLI was required to determine whether Reap made "a reasonable showing" that she was suffering from a latent injury. *Id.* Reap was not required to also persuade the DLI that her injury was in fact attributable to an industrial accident, and a statement or finding that Reap was injured in the course and scope of her employment was not essential to the DLI's ultimate determination in this case. The issue in this case is therefore whether the hearing examiner erred in concluding that Reap made a reasonable showing that her herniated cervical disc was a latent injury or condition.
In ***Bowerman v. Employment Security Commission****, 207 Mont. 314, 673 P.2d 476 (1983),* the Montana Supreme Court held that in cases of latent injury the time period for filing notice of claim does not begin to run until the claimant reasonably should have recognized (1) the nature, (2) seriousness, and (3) probable compensable character of his latent injury. (***Id.*** at 319.) The claimant in ***Bowerman*** was involved in an industrial accident which he reported to his employer. When he subsequently saw a doctor concerning headaches and pain, the doctor attributed his symptoms to a condition unrelated to his injury. Claimant did not learn that his symptoms were caused by the industrial accident, and he did not file his claim, until more than three years after the accident. The Supreme

Court held that the claim was not barred by the statute of limitations since claimant's injury was latent. The facts in this case are analogous to those in ***Bowerman***. Dr. Powell initially attributed Reap's upper arm and shoulder pain to carpal tunnel syndrome, a condition which had developed over a period of time and which was characterized as an occupational disease. It is unreasonable to expect that Reap should have second guessed her physician and discerned that her new symptoms were in fact unrelated to her occupational disease. Dr. Powell testified that carpal tunnel syndrome frequently causes aching into the arm and up into the shoulder area, and that he believed carpal tunnel syndrome was causing Reap's symptoms. Clearly, Reap could not have reasonably attributed her upper arm and shoulder symptoms to an industrial accident occurring on February 3, 1990. Appellant argues that Reap should have been aware of her injury when Dr. Cooney told her on August 20, 1990, that she may have something else wrong with her. Dr. Cooney, however, was unable to diagnosis any new condition and referred Reap back to Dr. Powell. Dr. Powell received Dr. Cooney's EMG test results, but still failed to diagnose Reap's true condition. Moreover, even if Reap had reasonably been put on notice of her injury at the time of Dr. Cooney's examination, she filed her claim on August 15, 1991, which was within twelve months of that notice. In ***Bowerman*** the Supreme Court held that the one-year filing requirement was tolled during the time the claimant was unaware of his injury. Buttrey argues that ***Schmidt v. Proctor & Gamble,*** *227 Mont. 171, 741 P.2d 381 (1987),* and ***Hando v. PPG Industries,*** *236 Mont. 493, 771 P.2d 956 (1989),* support its contention that Reap should have recognized the nature and cause of her cervical condition within the one-year filing deadline. Neither case supports its position.
In ***Schmidt*** the claimant failed to seek medical care during the year following his injury notwithstanding obvious medical symptoms. In ***Hando*** the claimant was ultimately diagnosed as suffering from a condition caused by her exposure to paint fumes at her place of work. She had previously gone to several doctors in an attempt to find the cause of her condition, but none diagnosed her ailments as being related to the paint exposure until the one year statute of limitations had expired. Under those circumstances, which are analogous to those in this case, the Supreme Court held that the one-year period for filing her claim did not commence running until the diagnosis linking her injuries to her exposure was made. In this case it was Dr. Gannon who finally diagnosed her herniated disc. Immediately after that diagnosis, Reap filed a claim for her injury.

ORDER

There was substantial credible evidence supporting the DLI's waiver of the one-year filing requirement. The hearing examiner correctly applied the law in reaching his decision. Accordingly, the October 27, 1993 findings of fact, conclusions of law and order entered by James L. Keil are **affirmed**. DATED in Helena, Montana, this 8th day of August, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James P. Harrington
Ms. Sara Sexe
Ms. Melanie A. Symons

1. The Amended Petition on Appeal was filed after the clerk of the Court returned Buttrey's original Petition on Appeal to Buttrey's counsel because the petition did not comply with Court rules governing notices of appeal. The return of the petition left the Court's file incomplete so the Court recently requested Buttrey return its original petition for inclusion in the Court file. That original petition was returned to the Court on August 4, 1994. The Court will no longer return notices of appeal when they fail to technically comply with the Court's rules. However, appellants will continue to be notified of technical defects so that they may file amended notices which fully comply with the rules.

2. Section 39-71-204 (3) provides:

If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge.